

IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU 0030 OF 2008
(On Appeal from Civil Action No. 92 of 2004)

BETWEEN:

TOTA RAM SHARMA

(Appellant)

- and -

AKHIL PROJECTS LIMITED

(Respondent)

RULING ON APPLICATION TO VACATE HEARING DATE

Introduction

1 This is an application by Tota Ram Sharma (hereafter the Appellant) for a series of orders including an order to vacate the present hearing date of this appeal. The matter is presently listed for hearing before the Court of Appeal on 17 March 2009. The application which was made and filed on 6 March 2009 applies for the following orders:

- (1) that the hearing date presently set for this appeal be vacated;
- (2) that Philips J provide the Appellant with a copy of the handwritten notes used by her to deliver her judgment on 9 May 2008;
- (3) that the Deputy Registrar of the High Court at Lautoka be ordered to release the transcript of the tape recording in respect of this matter within 14 days the date of the said order;

- (4) that the Registrar of the Court of Appeal be ordered to release the copy of all the recorded tapes to the Appellant in respect of this matter to enable the plaintiff to fill gaps in the incomplete transcript

The Appellant sought other consequential orders.

- 2 The appeal is against a judgment of Philips J in the High Court delivered 9 May 2008 following a trial occupying the 28th, 29th and 30th of November 2006 and the 15th, 16th and 17th of January 2007. The issues at trial, as Philips J observed in the opening paragraph of her judgment of "[are] premised on three agreements for sale of land between [the Plaintiff] and the defendant." The action by the Appellant (who was the plaintiff at trial) was dismissed with costs. Most of the grounds of appeal complain about decisions by the learned trial judge in respect of matters which arose at the trial. In addition, ground 1 of the grounds of appeal complained is about the dissolution of a Mareva injunction. The perfected grounds of appeal include an averment which suggests that there may be further Grounds "as may be applicable on the receipt of the High Court of Fiji's transcript or record".
- 3 I have made this somewhat detailed recitation of the grounds of appeal in view of paragraph 19 of the affidavit of the Appellant in support of this summons. The Appellant says:

That the gap in the transcript can only be filled by the 17th tapes that was (sic) used to prepare the transcript. I also request the copy of the tape to prove to the Honourable Court of Appeal how Madam Phillip (sic) was raising her voice at my counsel or interfering with his cross examination. The tape will assist me in proving that her Ladyship Madam Philip (sic) was bias and yelling at my counsel.

Those allegations are very serious ones indeed. That is reflected in Ground 2.

Arguments in support of the application

- 4 In support of the application before me, two broad points were taken. The first was that the certification, apparently under the hand of Philips J, is not a certification of the correctness of the record. The second main point taken is that the gaps in the transcript are such as to prevent counsel for the Appellant from preparing his written

argument and to prevent counsel for the Appellant from presenting his case fully and fairly before the Court of Appeal.

Transcript not certified

5 As to the first main point, was contended by counsel for the Appellant that when one looks at page 86 of the Court of Appeal bundle that all that the judge was doing was certifying that the proceedings in respect of the 28th, 29th & 30th of November 2006 and the 15th, 16th & 17th of January 2007 were transcribed from a tape recording. There does not appear to be any required form or statutory formula for certification. It is clear to me that Philips J was certifying the record and not declaring how certain components of it were compiled. Counsel in this regard went on to suggest that it was apparent that the judge had not properly reviewed the transcript based on the tape recordings. It was contended that this was evident from a gap in the transcript at page 305. That page is numbered 305 but it is blank. There are other gaps as well. It was contended by counsel for the Appellant that the totality of the evidence supported a conclusion that the learned judge had not gone through the transcript properly. In my judgment, neither the (gaps either taken alone or cumulatively) nor the blank page force me to a conclusion that the judge signed the record as correct notwithstanding that she had not properly or adequately reviewed the record. Such a contention is a fairly serious accusation of dereliction of duty on the part of a judge of the High Court of Fiji. Before I could even begin to consider this matter to be established, I would need some pretty compelling evidence. Evidence attaining that standard was not placed before me at the hearing of this application.

Gaps in the transcript prepared for appeal

6 It was contended by counsel for the Appellant that there were a number of gaps in the transcript provided as the record prepared for appeal. He suggested that these gaps needed to be attended to before the appeal could be prosecuted by the Appellant in order to give a full and fair account of himself and to support the grounds of appeal as pleaded. It was also contended that the gaps made it impossible to prepare his written argument. During the course of the hearing of this application, I invited

counsel to identify the gaps in the transcript (there can be no doubt that there are obvious gaps) which were such as to prevent him from properly presenting his client's case to its best advantage before the Court of Appeal. Counsel for the Appellant accepted my invitation and I was taken to a number of passages in the transcript which, in so counsel contended, supported his complaint.

7 Before examining the gaps identified by counsel, a number of points need to be made about the way in which this issue has been handled since it was identified as an issue by counsel (see paragraph 4 of the affidavit of the Appellant sworn on 6 March 2009). These points are:

- (1) The problem was identified as long ago as November 2008. (See paragraph 3, 4 & 5 of the affidavit of the Appellant). The matter was first raised in a letter to the Registrar of the Court of Appeal on 25 November 2008. The pertinent paragraph of that letter is "We confirm that the Transcript does not have the Judge's handwritten notes and further the tape has a lot of gap (*sic*) that needs to be filled." The urgent attention of the Registrar was invited but the Registrar was not asked to do anything. I should pause at this stage to note that there were a series of letters to the Registrar of the Court of Appeal and other court officials in connection with these proceedings. None of those letters were copied to the lawyers representing the Respondent. This is unacceptable. It is not simply professional courtesy to send a copy of the letter to the opponent in proceedings of this nature: it is mandatory. This court will not tolerate such conduct.
- ~~(2) No attempt was ever made to consult the Respondent or the lawyers acting for him as to any gaps in the transcript.~~
- (3) Counsel for the Appellant in the course of submissions before me accepted that notes were taken either by himself, his co-counsel or two clerks sitting behind him in the course of the conduct of the trial. Notwithstanding this abundance of notes, no attempt appears to have been undertaken to identify possible corrections to the transcript.

- (4) On 15 December 2008 the lawyers representing the Appellant wrote to the Registrar of the Court of Appeal saying that they were still waiting for copies of the judge's handwritten notes and copies of the tape to complete the gaps. The letter concludes: "Please do not list this matter for the call over in February 2009 as the record is incomplete *and will cause great prejudice to the Appellant in his appeal.*" Despite this alleged great prejudice nothing appears to have been done to alleviate the problem other than writing to the Court and complaining about it.
- (5) On 23 January 2009 (that is, after the call over of this matter and after a date for hearing before the Court of Appeal had been set) the lawyers for the Appellant wrote to the Registrar of the Court of Appeal and said: "We have perused the record and found that the judge's hand notes (*sic*) that she used in delivering her Judgment is not in the record. Further we were supposed to get the copy of the tape to check the Tape Transcript that is incomplete in most places." The letter ends only with the concluding words "Your urgent attention in this matter will be highly appreciated."
- (6) On 11 February 2009, the lawyers for the Appellant again wrote to the Registrar of the Court of Appeal. On this occasion the lawyers complained that they were unable to comply with the orders for the filing of written submissions on the part of the Appellant "until and unless we are given the tape for the trial to fill the gap that is left by the person preparing the record." This matter is repeated in a letter dated 17 February 2009 to the Registrar from the self-same lawyers. A similar letter dated 22 February 2009 asserts: ". . . it is *impossible* for us to file our submission when the record is incomplete . . ." [emphasis added]

In essence, the lawyers for the Appellant were saying that it is impossible for them to file written submissions without the complete transcript and that absent such a transcript, justice cannot be done to the Appellant in the conduct of his appeal before the Court of Appeal. It was against that background that counsel for the Appellant

was invited by the Court to make good those claims by references to the alleged deficiencies in the Transcript.

8 Counsel for the Appellant identified the following gaps in the transcript as matters which supported his contention that, absent rectification of the transcript, his client could not obtain a fair hearing and/or which rendered the preparation of his submissions *impossible*. They are:

- (1) Transcript page 371. This page records that there was no re-examination at the conclusion of cross examination of this witness. Counsel for the Appellant asserted that there was re-examination. When I asked what the re-examination was all about, counsel was unable to answer. The notes that he and his co-counsel had taken (together with the notes of the two clerks referred to above) were, he told me, not available to him in this hearing. I was unable to determine whether, contrary to the certified record, there had been any re-examination and whether, assuming there had been such re-examination, it had any effect on the outcome of the case or the credibility of any material witnesses.
- (2) Transcript page 139. About halfway down the page, the witness was asked whether he or she could tell the court whether the once the Survey Plans are approved was that plain sailing to have a new title issued once the plans are approved. The answer given was "The purpose of doing the sub-division used to get new Titles over the area to be . . . from the Head Title." The missing word is probably "taken" but whatever it is, it does not seem to be terribly material to the critical issue is in the trial and, thus, on appeal.
- (3) Transcript page 118. There is a gap in this transcript which seems to refer to a location. Again, there is no suggestion that this is particularly material to the critical issues at trial or on appeal.
- (4) Transcript page 128. Counsel pointed to the first gap at the top of the page. This gap clearly concerned the nature of a certain plan. It would appear to have little to do with the critical issues at trial or on appeal.

- (5) Transcript page 154 & 155. This issue concerned money that may or may not have been handed over. The sense of the answer in which the gap appears is tolerably clear. Again, it is difficult to see what harm flowed from this gap in relation to the issues at trial or on appeal.
- (6) Transcript page 388. This was a gap in a brief ruling by the court. There is nothing to suggest that the sense of the ruling is diminished and the ruling does not appear to be of great moment in the scale of things. This ruling is not mentioned in the Perfected Grounds of Appeal.
- (7) Transcript page 309. The gap in this respect concerns the place where a temple was to be situated. The sense of the answer is clear notwithstanding the gap.
- (8) Transcript page 323. This is plainly a reference to the pleadings. There is no difficulty with this so far as I can see.
- (9) Transcript page 330. The gap in this case was easily solved at the suggestion of counsel for the Respondent. The obvious words are "Rural Council".
- (10) Transcript page 305. This is the page which is left blank and, so counsel for the Appellant contends, is evidence that the learned trial judge didn't check the notes. He says if she had checked, this page gap would have been fixed. I have dealt with this earlier in this judgment and there is nothing to add to save for one matter: the sense of the text on page 304 connects clearly with the commencement of the text on page 306. There is no evidence that anything was missed out.
- (11) Transcript page 399. This is a gap in a submission by counsel for the Defendant/Respondent. It is not immediately obvious what fills the gap. However there is no evidence presently before me which supports the conclusion that it affected a critical issue in the trial or on appeal.
- (12) Transcript page 423. The gap in this part of the Transcript is capable of being significant. However counsel was unable to explain quite how.

(13) Transcript page 433. It is difficult to see, for present purposes, the significance of this passage.

It will readily be seen from the foregoing brief analysis that none of the matters raised above were demonstrated *at the hearing before me* to be capable of either preventing counsel for the Appellant from preparing his written argument or was likely to have the effect of denying the Appellant a fair hearing before the Court of Appeal. I have not overlooked the submission of counsel for the Appellant that I should look at the gaps identified on a cumulative basis. Even when of that exercise is undertaken, it is clear that on the material presented before me in support of the application that neither of the principal concerns expressed in the letters by the Appellant's lawyers is made out.

- 9 It is also appropriate to add that during the course of the hearing in connection with this application, that I took a break to enable counsel to review the transcript and to identify any further matters in the Transcript which rendered the preparation of his written submissions impossible or jeopardised a fair hearing on behalf of his client for the Court of Appeal. In my judgment, on the material presented to me, the case for the Appellant on this application was not made out. I should add that I am far from saying that it could not be made out. It may be that a reference to the notes will present completely different complexion on the matter. However, I could see no reason why a date is set months in advance for the Court of Appeal to hear this matter should have been set aside on the basis of the material presented to me at the hearing. One also has to remember, as counsel for the Respondent forcefully reminded me, that the interests of the Respondent have to be considered too. Dotted throughout the transcript of the whole of the proceedings other than at the trial itself are references to assertions that the Appellant has conducted his case so as to waste time. Naturally, it is not open to me to resolve that issue on this application. However, I accept from counsel for the Respondent that his client is over 90 and is anxious to

bring the matter to finality. That is not the primary reason for me making the findings that I have made. However, I have taken that into account.

- 10 It will be recalled that serious complaints were made by the Appellant (see paragraph 19 of his affidavit sworn on the 6th day of March 2009) about Philips J that she interfered with cross examination by counsel for the Appellant and that she was biased and yelling at him. It was not suggested that there were any gaps in the transcript in this regard. Presumably the only basis upon which the tape recordings are required in this regard is to ascertain in the tone of voice used by the learned judge when she made the interruptions alleged against her. This is a matter which is capable of being raised before the full Court of Appeal. No attempt was made in the application before me to identify the passage(s) in proceedings in which it is said that Philips J behaved in the manner alleged. There is nothing in Ground 2 of the amended Perfected Grounds of Appeal which gives any clue as to the event(s) which are said to give rise to this contention. Until these events are identified it is not possible to even consider the release of portions to the tape have that issue determined.
- 11 During the course of argument counsel for the Appellant made reference to a practice direction made in the 1980s in which there was a requirement for a proper identification of the gaps in any record and the possible suggested solutions. On any view, that practice direction has not been complied with.
- 12 Where it is suggested by a litigant that the record is defective the first question to be asked is for the purpose of identifying what it is missing. The next thing to assess is the effect this will have on the case for that litigant or his opponent. On the material placed before me, it was not necessary to look any further than that because the Appellant has not demonstrated this. If that hurdle is overcome and the gaps or inaccuracies are such as to cause a real concern about the fair presentation of an appeal, THEN one looks to methods to deal with those problems and starts to consider what sources of information might assist in filling those gaps. That exercise is

undertaken with the Perfected Grounds of Appeal in mind because that defines the real issues on appeal.

- 13 It was accepted by counsel for the parties that there is an obligation on counsel to keep a proper record of proceedings. As any experienced advocate will readily concede, that is not always attained or attainable. Nevertheless, not even the most basic steps were taken to identify whether there were any real difficulties in this Transcript and whether or not they were such as to prevent one party or the other from fully and fairly presenting his case to the Court of Appeal.
- 14 On the material presented to me I could see no basis for adjourning the hearing of this matter before the Court of Appeal. That is not to say that there is not such material. But the onus was firmly and fully on counsel for the Appellant to make out his case. In my judgment, such a case has not - at least so far - been made out.
- 15 Before I made my final decision with respect to the disposition of this application, I canvassed with counsel whether or not in the circumstances which obtained at the time of the hearing of this application it was still possible to have the hearing given the absence of a written argument from the Appellant. Counsel for the Respondent said he didn't need a written argument from the Appellant. I was surprised to learn that counsel for the Appellant had not even commenced the preparation of his written argument so far as related to matters which were not dependent on the alleged gaps in the Transcript. Counsel for the Appellant said that he would need many days to prepare such an argument. It seemed to me that enough time has been taken up with this matter and no good purpose would be served by vacating the date or providing a date later in the Court of Appeal session. For that reason, I indicated to counsel for the Appellant that the requirement that he provide a written argument was, in the circumstances, waived. I also indicated that it was open to him to raise all the matters that he had raised before me on the hearing of the appeal before the Court of Appeal.

16 In the result, for the reasons I have given, the orders of this Court are:

- (1) hearing date to stand.
- (2) Appellant excused from filing written submissions.
- (3) Leave to renew application for adjournment before the full Court of the Court of Appeal.
- (4) Costs summarily assessed at \$1000. Such cost be payable within seven days of the date hereof.

DATED the 12th day of March 2009



(Andrew Bruce)
Justice of Appeal